

1 **BACKGROUND**

2 In the instant matter, in 2009, Alex Wai Shing Fong pleaded guilty pursuant to a plea
3 agreement to three counts of maintaining a place for the cultivation and distribution of marijuana,
4 in violation of 21 U.S.C. § 856(1)(a), one count of possession with intent to distribute marijuana, in
5 violation of 21 U.S.C. § 841(a)(1) and (b)(1)(D), and two counts of cultivation and possession with
6 intent to distribute one hundred or more marijuana plants, in violation of 21 U.S.C. § 841(a)(1) and
7 (b)(1)(B)(vii). Thereafter, on February 12, 2010, this Court sentenced Mr. Fong to a time-served
8 sentence and forty-eight (48) months of supervised release.¹ See Docket Entry No. 316.

9 Mr. Fong has now completed forty (40) months, or **83%**, of his supervised release term and
10 while on supervised release, has broadly complied with the terms and conditions of his supervised
11 release – except the condition requiring him to find and maintain gainful employment. However,
12 Mr. Fong is unable to comply with this condition because his immigration status no longer permits
13 him to lawfully work in the United States.

14 To explain, following his conviction – and subsequent release from custody in the instant
15 matter – Mr. Fong was placed into removal proceedings, where he remained in immigration custody
16 for upwards of a year. The resolution of such proceedings was that Mr. Fong, who was a legal
17 permanent resident (“LPR”) before he was convicted in the instant matter, lost his LPR status and
18 an order of deportation and removal was issued against him. However, when the United States
19 subsequently sought to remove Mr. Fong to his native Hong Kong, the People’s Republic of China
20 refused to permit him to return to Hong Kong. Consequently, for the past several years, with the
21 United States government unable to deport him Hong Kong or China, Mr. Fong has remained in the
22 United States, no longer an LPR and also without any status that permits him to lawfully work in this
23 country. In other words, he’s forcibly unemployed by virtue of his immigration status, or lack
24 thereof. And faced with this dilemma, Mr. Fong has, in order to financially survive for the past
25 several years, relied on his significant other, Suzanna, or, resorted to trying to earn money through
26 playing poker at the casinos in the area.

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28 ¹ At the time this Court sentenced Mr. Fong, on information and belief, he had already
spent approximately thirty-nine (39) months in federal custody since his arrest in this matter.

1 Of course, this difficulty is further exacerbated by the continuing requirements of Mr. Fong's
2 supervised release. At one point, he was offered the opportunity as a driver in and around the Bay
3 Area. But that job, which was going to at least provide some consistent, stable, albeit minimal
4 earnings, was subsequently denied to him as well *once he shared* that he was on supervised release.

5 Although Suzanna's earnings and Mr. Fong's occasional poker winnings were enough for
6 the couple to stay afloat for the past couple of years, the arrival of their newborn daughter has
7 completely upended their financial stability. Suzanna recently gave birth to their newborn child last
8 month in May 2013 and her employment at a local department store does not provide enough money
9 to care for the entire family. As such, with the arrival of their newborn and the attending costs of
10 becoming new parents, Mr. Fong obviously needs to be put in the best position possible so as to
11 contribute to his family's financial well-being. Given his changed family circumstances, positive
12 track record of compliance with the terms of his supervised release for the past forty (40) months and
13 the serious need for Mr. Fong to be put in the best position possible to be able to potentially
14 contribute to the financial needs of his family, Mr. Fong respectfully moves this Court for an order
15 granting early termination of his remaining time of supervised release.

16 DISCUSSION

17 Pursuant to Title 18 United States Code section 3583(e), this Court has the authority to grant
18 early termination of a previously imposed term of supervised release. Section 3583(e)(1) provides:

19 (e) Modification of conditions or revocation.— The court may, after considering the
20 factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5),
21 (a)(6), and (a)(7) –

22 (1) terminate a term of supervised release and discharge the defendant
23 released at any time after the expiration of one year of supervised release,
24 pursuant to the provisions of the Federal Rules of Criminal Procedure relating
25 to the modification of probation, if it is satisfied that such action is warranted
26 by the conduct of the defendant released and the interest of justice;

27 18 U.S.C. § 3583(e)(1); *see also* Fed. R. Crim. Procedure 32.1(c)(1), (2)(B) & (C) (providing for
28 hearings for modifications of supervised release, unless the result is favorable to the person
supervised and the government does not object after notice).

As noted by the Ninth Circuit in *United States v. Miller*, 205 F.3d 1098, 1101 (9th Cir. 2000),

1 the authority to terminate or modify supervised release permits a district court to account for new
2 or unforeseen circumstances. “Occasionally, changed circumstances – for instance, exceptionally
3 good behavior by the defendant or a downward turn in the defendant’s ability to pay a fine or
4 restitution imposed as conditions of release – will render a previously imposed term or condition of
5 release either too harsh or inappropriately tailored to serve the general punishment goals of section
6 3553(a).” *Id.* (quoting *United States v. Lussier*, 104 F.3d 32, 36 (2nd Cir. 1997)).

7 In addition, the national policy of the United States Probation Office itself is in favor of early
8 termination for low risk offenders. According to *The Supervision of Federal Offenders, Monograph*
9 *109*, the relevant portion attached hereto as Exhibit A, indicates that after eighteen (18) months of
10 supervision, “there is a presumption in favor of recommending early termination for probationers
11 and supervised releasees,” if they are not career violent and/or drug offenders, have no identified risk
12 to the public, and are free from moderate or high severity violations. *Early Termination Monograph*
13 *109*, § 380.10(b) (2010); *id.* at § 380.10(e)(1) (citing 28 U.S.C. § 994(h)).²

14 Moreover, last year, well before the increased budget constraints brought on federal
15 sequestration, United States District Judge Robert Holmes Bell, Chair of the Judicial Conference
16 Committee on Criminal Law, issued a memorandum directed to all district court and magistrate
17 judges entitled *Cost-Containment Strategies Related to Probation and Pretrial Services Offices*, the
18 relevant part attached hereto as Exhibit B. The memorandum addresses the “imperative,” in light
19 of increasing budget constraints, that the courts “align [their] resources effectively to address those
20 cases that are more complex and pose the greatest risk to community safety, while reducing
21 expenditures in less complex and lower risk cases when it is prudent to do so.” *Id.* The
22 memorandum further advocates for the early termination of supervised release according to listed
23 factors, such as whether the defendant is reintegrating into a stable community; avoiding alcohol and
24 drug abuse; making progressive strides toward supervision objections and complying with all
25 conditions of supervision.

26 Based on pertinent § 3553 factors, and the factors listed by District Judge Bell, Mr. Fong is

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28 ² Mr. Fong is not a “career violent and/or drug offender” within the meaning of 28
U.S.C. § 994(h); that is, he does not have at least two prior convictions for crimes of violence nor
violations of the Controlled Substances Act. *See* 28 U.S.C. § 994(h)(2).

1 a compelling candidate for early termination of his supervised release. To address Judge Bell's nine
2 criteria in order:

- 3 • **"1. Stable community reintegration (e.g., residence, family, employment)."** Mr. Fong,
4 who was born in Hong Kong, lives near his parents in the Bay Area with his partner of more
5 than eight years. His partner, Xiao Mei "Suzanna" Mo, gave birth to their first child in May.
6 Mr. Fong's immigration status, as discussed above, has made it difficult for him to find
7 work, and he is required to check-in with the Department of Homeland Security every other
8 month for an update, if any, regarding a potential change in his status. Meanwhile, because
9 he is unable to lawfully work in the United States, he has been compelled to support himself
10 and his family through casino poker. *See Exhibit C: W-2G tax form.* If there Court were to
11 terminate his remaining term of probation, he might *at least* be hired in to a position of
12 informal day labor, like the aforementioned job opportunity of being a driver, which he was
13 originally offered, but later denied due to being on supervised release.
- 14 • **"2. Progressive strides toward supervision objectives and in compliance with all**
15 **conditions of supervision."** Mr. Fong has complied with all of the conditions of his
16 supervision. The lone exception is his employment status as discussed above and Mr. Fong
17 has done his best to work around that and provide what support he can to his family. And
18 the only reason that Mr. Fong is now requesting that the Court terminate his remaining eight
19 months of supervision is to put him in a slightly better position, or to eliminate one additional
20 hurdle, to gaining some form of stable employment, at a time when Suzanna and his newborn
21 child desperately need his financial assistance.
- 22 • 3. Mr. Fong had **"[n]o aggravated role in the offense of conviction."**
- 23 • 4. Mr. Fong has **"[n]o history of violence."**
- 24 • 5. Mr. Fong has **"[n]o recent arrests or convictions . . . or ongoing, uninterrupted**
25 **patterns of criminal conduct."**
- 26 • 6. Mr. Fong has **"[n]o recent evidence of alcohol or drug abuse."**
- 27 • 7. Mr. Fong has had **"[n]o recent psychiatric episodes."**
- 28 • 8. Mr. Fong poses **"[n]o identifiable risk to the safety of any identifiable victim"**
- 9. Mr. Fong poses **"[n]o identifiable risk to public safety."**

1 Taken collectively, the continued supervision of Mr. Fong is not necessary to “protect the public
2 from further crimes,” nor would it serve any other meaningful objective at all. *See* § 3553(a)(2)(c).
3 More than that, it is a waste of government resources, at a time when the governmental resources
4 especially need to be conserved and/or efficiently spent.

5 CONCLUSION

6 In summary, Mr. Fong has completed forty (40) months, or **83%**, of his forty-eight (48)
7 month term of supervised release. In that time, he has maintained a stable residence with his long-
8 term significant other Suzanna. He has had no new legal troubles, no problems with drugs or
9 alcohol, and has demonstrated that he poses no danger to society nor to any individual. His original
10 offense involved no violence and he has shown no signs of violence nor other concerning behaviors.
11 He has made every effort to comply with the terms of his supervised release and, with the exception
12 of the employment difficulties presented by his immigration and probation status, he has succeeded.

13 Importantly, Mr. Fong’s family has recently expanded and correspondingly, so have his
14 personal obligations. Terminating Mr. Fong’s term of supervised release would further his ability
15 to reintegrate into the community and find much-needed stable employment. Because the 3553(a)(1)
16 factors heavily militate in favor of early termination, Mr. Fong respectfully requests that the Court
17 grant his motion and terminate his remaining term of supervised release.

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19 Dated: June 10, 2013

Respectfully submitted,

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21 Federal Public Defender

22 /s/
23 BRANDON LEBLANC
24 Assistant Federal Public Defender
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